UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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DANYELL THOMAS, ET AL.,

Plaintiffs,

v. 16 CV 8160 (PAE)

BED BATH AND BEYOND, INC.,

Defendant.

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New York, N.Y.
November 29, 2018
10:34 a.m.

Before:

HON. PAUL A. ENGELMAYER

District Judge

APPEARANCES

HANG & ASSOCIATES
Attorney for Plaintiffs
BY: KELI LIU

GREENBERG TRAURIG
Attorneys for Defendant
BY: JONATHAN L. SULDS
JUSTIN F. KEITH

(Case called)

MS. LIU: Good morning. This is Keli Liu for the plaintiffs.

THE COURT: Good morning, Ms. Liu.

MR. SULDS: On behalf of the defendants, Greenberg Traurig, Jonathan Sulds and.

MR. KEITH: Justin Keith.

THE COURT: Off the record for a moment.

(Discussion off the record)

THE COURT: So with that, on the record, this is a pretrial conference and we have a formidable, but manageable, agenda today.

To begin with, I have rulings on the motions in limine which I intend, in a moment, to read aloud. And after that I want to take up a variety of granular issues relating to the upcoming trial, including understanding a little better about judge versus jury issues and some of the allocation of responsibility.

I want to get a more specific understanding of the length of the trial and who will be testifying, particularly given orders that limited the number of defense witnesses and particularly given some of the motion in limine rulings which may have implications.

I want to understand a little better the nature of the exhibits to which the parties do not agree with respect to

admissibility. I was confused as to some of what you intended.

And then, ultimately, I want to set a trial date, set a date for final conference for the week before, and want to also discuss the process for hopefully achieving a settlement here that would moot the trial.

So that's my agenda. If there are other things you'll want to put on the table, I will give you a floor to do that towards the end of the conference.

With that let's begin with the motions in limine.

In advance of trial, each party has moved in limine on a variety of matters. Both parties have submitted helpful briefs, for which the Court thanks counsel.

I'm about to put on the record the bases for the Court's rulings on the motions in limine. There will not be a written decision, instead, the Court will issue only a brief bottomline order setting out the fact of the disposition of the motions. So, if the reasons for the Court's rulings are important to you, you'll need to order today's transcript.

The Court will begin with the legal standards governing motions in limine briefly. "The purpose of an in limine motion is to aid the trial process by enabling the Court to rule in advance of trial on the relevance of certain forecasted evidence, as to issues that are definitely set for trial, without lengthy argument at, or interruption of, the trial. Evidence should not be excluded on a motion in limine

unless such evidence is clearly inadmissible on all potential grounds." Hart v. RCI Hospital Holdings, Inc., 90 F.Supp. 3d 250, 257-58 (S.D.N.Y. 2015). A court's ruling on such a motion is "subject to change when the case unfolds, particularly if the actual testimony differs from what was contained in a party's proffer." Luce v. United States, 469 U.S. 38, 41 (1984).

Several issues raised by these motions in limine turn on the application of Federal Rule of Evidence 403. That rule provides that a district court may exclude "relevant evidence" defined elsewhere as material evidence having "any tendency to make a fact more or less probable than it would be without the evidence," Federal Rule of Evidence 401 -- if its probative value is substantially outweighed by a danger of one or more of the following: "unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence," citing Rule of Evidence 407.

The Court first addresses plaintiffs' motions before turning to defendant's motions.

The Court first resolves plaintiffs' first three motions in limine. Because the three implicate related issues, the Court addresses them together.

In their first motion, plaintiffs ask the Court to exclude evidence, testimony, and/or arguments regarding any plaintiff's separation from employment at Bed Bath and Beyond,

which I will refer to as Bed Bath. Plaintiffs argue, first, that this evidence is irrelevant under Rules 401 and 402; second, that even if this evidence is slightly relevant, it is misleading and likely to cause unfair prejudice to plaintiffs, requiring exclusion under the Rule 403 balancing inquiry; and, third, that it is impermissible character evidence, prohibited by Rule 404(b)(1).

In their second motion, plaintiffs ask the Court to exclude evidence of any plaintiff's unsatisfactory job performance as irrelevant under Rules 401 and 402, and likely to mislead the jury and cause undue prejudice to plaintiffs, so as to warrant exclusion under Rule 403.

In their third motion, plaintiffs ask the Court to exclude evidence regarding the workplace disciplinary record of any plaintiff. They do so for the same reasons: That such evidence is irrelevant under Rules 401 and 402, and that its probative value is substantially outweighed by the likelihood of misleading the jury and causing undue prejudice to the plaintiffs under Rule 403.

Bed Bath counters that all three categories of evidence are relevant under Rules 401 and 402. Bed Bath argues that such evidence, by shedding light on a plaintiff's job performance, also sheds light on the plaintiff's job responsibilities, and therefore has a proper place in the jury's consideration of whether the plaintiff's role as an

Assistant Store Manager at Bed Bath made him or her an exempt employee under the FLSA and New York Labor Law. Bed Bath contends that the evidence of terminations, performance deficiencies, and disciplinary infractions on the part of the plaintiffs is not prejudicial at all. Therefore, under Rule 403, its probative value outweighs any minimal prejudicial effect. As to the issue of a job termination, Bed Bath argues that even if such an event may reflect negatively on the terminated plaintiff's character, it is still admissible under Rule 404 because it bears on a relevant issue, job duties, and indeed is highly relevant to that issue. Finally, Bed Bath argues that all three motions in limine are premature, and that evidentiary issues of this nature should be decided one by one, at trial, on the basis of the specific item of evidence at issue.

The Court evaluates all three motions in limine together, as has Bed Bath, because they all implicate similar concerns.

Subject to an important caveat that I will address in a few moments, the Court is going to grant each of the plaintiffs' three motions to exclude all evidence in each of the three categories of evidence in question. The Court thus excludes as a general matter all evidence of any plaintiff's separation, unsatisfactory job performance, and disciplinary records.

The Court does so pursuant to Rule 403. On the probative value side of the equation, the fact that a plaintiff employee was terminated, disciplined, or written-up for poor performance has, in general, limited probative value as to the key question here, which involves the nature of the plaintiff's job responsibilities. To be sure, the Court certainly understands that, in a particular or one-off situation, the communications attendant to a termination or disciplinary write-up or negative performance review might hypothetically be revealing as to the employee's actual job responsibilities. For example, a write-up of an employee for poor performance supervising his or her 20 direct reports potentially might reveal the nature of the supervisory duties of that employee. And, continuing with the hypothetical, it's possible that no evidence other than the disciplinary write-up would reveal those supervisory job responsibilities. In those hypothetical circumstances, there could be meaningful probative value to a communication relating to a write-up of an employee attendant to his or her termination, discipline, or adverse performance review. But Bed Bath has not given the Court any reason to assume that these hypothesized circumstances are commonplace, if they even existed at all. On the contrary, it strikes the Court as improbable that, particularly in an established and sizeable concern such as Bed Bath, documents, memos, or other quotidian materials do not exist to set out job duties.

Indeed, it may be the case that a portion of a performance review sets out the duties without needing to go on to talk about whether or not the individual employee lived up to those to duties. The Court therefore finds, in the main, that the testimony or documents relating to these categories of adverse employment events have very limited incremental probative value as to the nature of the employee's job duties. And I would note that Bed Bath does not argue that the termination, discipline, or performance write-ups, adverse performance write-ups of employees are probative for other reasons, for instance, as bearing on employees' credibility. The Court shares Bed Bath's implicit assessment that adverse employment actions do not, in the main, bear materially on an employee's credibility as a testifying witness, even if one could hypothesize a circumstance in which they did.

On the countervailing side of the Rule 403 equation, there are substantial and obvious reasons why admitting evidence of negative performance evaluations, adverse disciplinary actions, or terminations have the capacity to unfairly prejudice a plaintiff. To be sure, the date when an plaintiff's employment ceased, and any gaps in the employee's active service, are presumably germane, at a minimum, to damages. The Court does not exclude evidence of the date of an employee's service as an Assistant Store Manager. But exposing to the jury reasons for any of these adverse employment events

has the potential to tarnish an employee with irrelevant yet denigrating facts. An employee may have been terminated, disciplined, or poorly reviewed on account of tardiness, theft, workplace harassment, substance abuse, incompetence, rudeness, or a host of imageable other shortcomings or misdeeds. These are completely irrelevant to the issues at hand. The matter of job responsibilities on which the issue of an FLSA or New York labor law exemption turns is an objective one. Bed Bath's proposal to allow such negative details to be put before the jury has the obvious potential to prejudice the plaintiff, who would be seen as a bad actor or undeserving of monetary recovering regardless of his or her -- and it has obvious potential to distract and confuse the jury from the discrete objective issues at hand. Further, a claim of improper conduct by a plaintiff would presumably or rather evidence -- receipt of evidence of improper conduct by a plaintiff offered by Bed Bath would presumably entitle that plaintiff to rebut with his or her side of the story. Bed Bath's approach to these issues thus squarely implicates all of the countervailing considerations under ruled 340; specifically, the risks that probative value could be substantially outweighed by about the potential for unfair prejudice, for confusion, and for delay. The Court therefore finds, with no difficulty, that the Rule 403 balance requires, as a general matter, the exclusion of the adverse evidence at issue.

The Court therefore grants the plaintiffs' first three motions in limine. There is, however, as I said beings an important caveat. Bed Bath has not proffered any specific instance of terminations, poor job writeups or disciplinary actions which it contends actually bear upon the issue at hand: Whether an Assistant Store Manager's responsibilities make him or her exempt under the FLSA or New York labor law. That may be telling. There may be no such evidence whatsoever concretely that is meaningfully probative of the issues in this case. But, con severe able, in an individual circumstance, the communications attendant to an adverse employment action taken against a plaintiff may significantly bear on the employee's job responsibilities as an Assistant Store Manager an, conceivably, they may do so in a way that other more quotidian records do not. I've already offered the possibility a that the way in which a performance review is written upsets out in one place the responsibilities and in another place the evaluation of how the employee did. There is ever I've possibility that a redacted performance review that sets out the responsibilities but does not include the negative evaluation of the plaintiff may well be admissible. Bed Bath may well have an argument, in individual listed circumstances, for admission under Rule 403 of evidence tending to reveal the adverse employment action. The Court's ruling today therefore does not preclude Bed Bath from seeking leave of the Court, on

an incident or employee or document specific base, to offer such evidence. For avoidance of doubt, however, the Court expects such an application to be made outside the presence of the jury, in writing, and in advance of the testimony of the employee in question, so that the Court can give such application due care. Bed Bath may not initiate questioning of a witness about such an adverse employment action without express leave of the Court. This ruling, therefore, gives Bed Bath the opportunity, in an individual situation, to argue that the Rule 403 balance as to a particular add document or particular adverse action favors its admission, but if Bed Bath seeks is to do so, it must do so with adequate notice so as to give the plaintiffs a chance to assess that alleger and respond, and to give the Court a fair opportunity to reflect and rule.

This ends the ruling on that motion. I will just add that later on one of the things I'm going to be asking you to do is to revise your joint pretrial order to conform to the significantly narrowed scope of the witnesses in the case pursuant to my earlier order and I expect as part of that you will conform the physical proof in the case, for example, the exhibits, performance reviews, so as to be consistent with this ruling. And I would encourage the parties, as part of that, to identify the redactions you intend in such documents so as to allow Bed Bath to get the legitimate mileage it can out of

documents in the employee's file without bringing to bear needless adverse information.

Moving on. The Court has already resolved plaintiffs' fourth motion in limine, involving Bed Bath's many undisclosed witnesses. And I see that Bed Bath has adapted its proof accordingly. Later, when we turn to address the trial plan, I will be eager to understand the extent to which the significant reduction in the number of Bed Bath's trial witnesses reduces the parties' estimates of the length of trial.

That completes my discussion of plaintiffs' motions. The Court now the turns to Bed Bath's motions.

Bed Bath first asks the Court to exclude evidence of, and any reference to, its size and financial condition. It argues that its size is irrelevant under Rules 401 and 402, and likely to inflame and prejudice the jurors, so as under Rule 403 to substantially outweigh any limited probative value. Plaintiffs counter that defendant's size and financial condition are directly relevant to the motives of defendant's executives in labeling plaintiffs as Assistant Store Managers while assigning them to perform primarily nonexempt tasks to save money. Plaintiffs also argue that the impact of defendant's public image and stock price are relevant to defendant's corporate witnesses's credibility and bias.

The Court agrees with Bed Bath and grants its motion in limine. The overall sides, revenues, and profitability of a

large corporation have no probative value whatsoever as to the responsibilities of the particular subset of employees denoted as assistant store managers. Such information, if put before the jury by plaintiffs, would serve the patently inappropriate purposes of inviting the jury either to disfavor Bed Bath as a large corporate behemoth, or to make the jury more comfortable finding for the plaintiffs on the ground that any redistribution here, any recovery here, would represent a minuscule portion of Bed Bath's revenue. The jury, however, is not tasked with being the greater populist or being Robin Hood. It is tasked with making a granular determination as to particular employees' job duties, so as to determine whether an FLSA or New York Labor Law exemption applies, and if it does not, what the hours worked were of such employees.

To the extent that plaintiffs imagine that Bed Bath's profitability or size bears on its motivations to misclassify plaintiffs, that argument also is meritless. Any business, whether large or small, my may misclassify a worker, whether inadvertently or with the deliberate goal of denying workers their due in order to profit-maximize. But one cannot infer willfulness from corporate size. Now if plaintiffs had adduced let's say a memo from corporate headquarters directing that Assistant Store Managers be misclassified that would be a different issue. Such a hypothetical would be strong evidence of willfulness. But that memo could exist in a small, medium

size or large employer. Without more, corporate size simply does not speak to willfulness. Small, medium and large businesses each sometimes obey the law and sometimes each break it. Size is no proxy for motive to break the law.

Under both Rule 401 and 403, the Court therefore precludes any references to corporate size, stock price, revenues, profitability, and the like.

And the ruling, of course, extends to counsel's arguments, including opening statement. I am quite concerned that plaintiffs' counsel somehow imagined that this was conceivably a proper area for commentary or examination. To be crystal clear: There is to be no commentary by counsel, including even hints about Bed Bath's size or profitability or revenues etc., in jury addresses, whatsoever. Just as defense counsel are not to dirty up plaintiffs with irrelevant workplace misconduct, plaintiffs' counsel are not to dirty up defendant with irrelevant references to corporate size and financial condition.

This ruling leaves plaintiffs fully at liberty to develop their responsibilities as Assistant Store Managers. It may be that the size of a particular store and the number of workers there is germane to that issue -- a worker who has supervisory responsibilities may need to develop the scope of the workforce that plaintiff supervised. I do not know. But that is no charter to develop broader evidence of Bed Bath's

corporate size or payroll as a whole.

Bed Bath next and finally asks the Court to exclude evidence of, and any reference to, other lawsuits involving it as irrelevant under Rules 401 and 402; as excludable under Rule 403, on the ground that any probative value of such other lawsuits is substantially outweighed by, among other factors, the risk of unfair prejudice; as involving receipt of improper character evidence under Rule 404; and as inadmissible hearsay under Rules 801 and 802. Plaintiffs have not filed an opposition.

The Court grants Bed Bath's unopposed motion. The fact that other parties have filed suits that are pending against Bed Bath is irrelevant to the merits of the suit filed here by these particular plaintiffs. Whether other workers in other stores claim misclassification or whether workers in other stores are quite satisfied with their classifications by Bed Bath says nothing about whether the plaintiffs here were wrongly denied overtime by a misclassification. The fact that two or more other pending lawsuits involving the same or similar misclassification claims involving other plaintiffs in perhaps other stores does not make the claims here more or less likely meritorious. Yet, references to such other unresolved suits would likely be mistaken by the jury as signifying likelihood of liability in such cases, unfairly prejudicing defendant. The Court accordingly precludes, under both Rules

401 and 403, any reference to other lawsuits.

That concludes the Court's rulings on the motions in limine.

All right. Having taken care of that material, let's turn now to the joint pretrial order and I'll ask everyone to please pull those out.

We're going to take a three-minute recess. I left mine upstairs.

Thank you.

(Recess)

The next issue I want to take up with you involves the allocation of responsibilities as between the judge and jury. I just want to make sure I understand where you're all going here. The jury will make the misclassification determination. You all agree that the judge will make -- the Court will make, if there is liability found, the ultimate damages determination.

You appear to conclude that the jury will determine the work hours that are worked by any employee.

Let's put for a moment aside willfulness and good faith. Let's just stop where we're at. What do you envision the verdict form then looking like with respect to the jury?

Put aside willfulness and good faith. Just as to the quantitative. For a given plaintiff, let's suppose there's a misclassification found, let's say for Ms. Miglis, plaintiff,

what do you envision the jury finding as to Ms. Miglis that would enable the Court's calculation of damages?

MS. LIU: I would imagine at least there are points specifically finding how much compensable work hours has been performed that will lead to the hours and the specific duties that she actually performed.

THE COURT: Well let me see if I understand it.

Is your view a unitary one, which is to say if she was nonexempt, then by definition all of her hours count towards the overtime calculation; or is your view something more nuanced, which is only her work doing nonexempt tasks counts?

I thought it was the former.

MS. LIU: It's the former. Maybe I misunderstood your question.

So I see it as two steps. First the jury is going to determine what did she actually do. That goes to whether she was actually misclassified. And then the hours kicks in, the hours becomes matters, because if we decide the first question, she was not misclassified, then the hours really doesn't matter.

THE COURT: Well then you lose the lawsuit. There is no liability.

But assuming that you have won, that's the premise of this line of questioning. For Ms. Miglis are you envisioning that the jury would then be tasked with finding for each

calendar year in which she testified that she worked what her aggregate overtime hours were?

Are you imagining a more fine-tuned analysis that might be at the level of the day, week, or month?

I'm trying to understand -- I understand that I'm ultimately to do the math here as to damages but that you envision the jury making the fact finding as to number of overtime hours.

I'm trying to get a more granular sense of what question would be put to them.

MS. LIU: I would say it's the first version where they would make a more simplified aggregate finding as to how many hours she testified worked --

THE COURT: In a given year or over the course --

MS. LIU: I would say --

THE COURT: It probably has to be on a given year because the salaries may be different each year, right?

MS. LIU: Yes. But that's going to go down to -- because she is going to testify on a weekly basis. She's not going to be able to testify or at least she's not going to add the math up. She's going to say this week I worked XYZ number of hours, so they can go and find that.

THE COURT: Let me backup. In a lot of FLSA cases usually involving small restaurants or nail salons or something nobody keeps records of hours and so unavoidably we have to use

proxies like best memory to get there.

This is a different type of company. Are there records reflecting the hours of your client?

MS. LIU: There are, I believe, log-in, log-out computerized records. But I believe it's not entirely accurate because as assistant manager, the defendants are in the position to correct me if I'm wrong, they were not really required to accurately track it but they did have some kind of computerized log-in log-out, sometimes they would put in, which we intend to introduce as evidence that was produced by defendants. But I don't believe that the records are complete for all the relevant years.

THE COURT: Is it your view that the computerized log-in and log-out records are a floor but that the employees worked more, or is it your view that they are useful but on any given day the employee might have worked more or less than reflected in the computerized hours?

MS. LIU: Would say it's a general reflection of the floor of the hours because she could have worked a bit longer after she logged out but that would reflect --

THE COURT: But perhaps she just decided to talk about the Super Bowl for two hours with a colleague during the workday and do no work.

Why would you assume that the log-in log-out necessarily captures -- why is it a floor as opposed to just

sort of a general premise?

MS. LIU: I'm not making the determination. I'm simply offering it's more likely that the testimony will be that I worked extra beyond the logged out hours, not watching football but doing actual work. But because she was classified as a manager she was not really required to actually track hours so that in itself reflect -- it's a baseline, I would say.

THE COURT: In any event, though, regardless of what weight the jury attaches to that species of evidence, you're envisioning now that the verdict form as to any individual plaintiff, we'll stick with Ms. Miglis, would ask the jury, if liability were found, to make a finding as to the overtime hours per year?

MS. LIU: Yes.

THE COURT: Defense, on that limited issue, put aside willfulness, good faith, just as to hours tabulation, assuming that you lose on liability, what do you envision the jury being asked that will facilitate my damages calculation?

MR. KEITH: Yes, your Honor.

So we think that the evidence will show that there is variation in volume of hours worked that is tied to seasonality, things like back to school, winter holidays and the like. So we think that a reporting on the verdict form of aggregate hours in a year is not going to be sufficiently

granular to conform to what we believe the evidence will show.

THE COURT: Why is that? In other words -- just move the mic a little closer.

In other words, while I understand that a jury in working through the hours might have to say during December we assume greater overtime than during August but that doesn't require the jury to -- there is no reason to require the jury to show it's work and to give a separate finding per month or per holiday season. That would simply matter if your advocacy and your tote board or your summary witness or however you're going to explain it to the jury as to why over all the course of the year giving bigger estimates for December and smaller for August you come up with X.

I'm trying to figure out why the verdict form, for example, would need to fine tune it quite that much.

MR. KEITH: So the reason I think, your Honor, for fine tuning is, if we are at the stage of the case where the jury has found liability as to one or more of the individuals, candidly we want them thinking critically about what the evidence has shown and what's been presented to them. And I think there's a concern that if it's just an aggregate, give a number of hours on average for the entire year, that that takes away that prompt to think critically; whereas, if you have to lock at the verdict form and go month by month, it may have been a few weeks by that point from the time testimony went in

about the seasonality and number of hours in January versus March and the like, and then having the jurors go through the mental exercise, which I don't think is going to be a significant burden. It's simply saying: OK. I heard testimony that December is a busy month. I'm going to attribute this many hours to December. I've heard testimony that things are slow in May. I'm going to attribute fewer hours to May, rather than simply trying to lump it all.

THE COURT: I can clearly sort this out later on but either way both of you are envisioning either at a more generalized or more specific level that there will be an entry per plaintiff, either per year or on a more fine-tuned level, with the number of hours.

Is there anything else you envision the jury needing to report on the verdict form to facilitate the Court's entry of damages?

Do we need to have the jury find the rate of pay or is that something that will be sufficiently undisputed in the evidence that you'll both be fine with my plugging in that number for math purposes?

MR. KEITH: I think the annual compensation is not going to be disputed. I think that's something the parties can stipulate to.

I think the issue of the math and the calculations are all issues that you, as the judge, will decide and what

methodology is used to do the arithmetic. I don't think the jury needs to report anything more than hours.

THE COURT: So do you both agree that the only data point we need the jury for, assuming liability for any plaintiff, is hours.

MS. LIU: Yes.

THE COURT: May I just ask you, defense counsel, just, although there is no need for me to address it now, I'm intrigued. What's your view about this log-in log-out document?

MR. KEITH: I believe the document that plaintiffs are referring to is an electronic schedule that's generated through a piece of scheduling software that the company used at least for some period of time at issue in this case. The Assistant Store Managers, as exempt employees, do not log-in and log-out. They don't punch a time clock. They don't write down when they come in and when they leave.

What is in the record and what was produced during discovery is a computer-generated schedule that says for Ms. Miglis, for example, on Monday you're going to be scheduled to work an opening shift so that means you come in at 7 a.m. and that means you leave at 2 p.m., for example. These are just hypotheticals I'm making up for illustrative purposes.

The schedule is simply an expectation and there will be times when someone will work to the schedule, will work

fewer hours and there could be times when someone would work --

THE COURT: What you're telling me is there's actually -- contrary to the impression I had a moment ago, there's not any action that an employee takes on any given day to create the inputting of data as to that person's hours?

MR. KEITH: That's correct.

THE COURT: So all we have here is an expectation, and there will be testimony in whatever direction I get it, as to whether it's fair to infer that people stuck to the schedule or were early or late as to the start or end date -- end time or, for that matter, taking breaks in between that are non-compensable.

MR. KEITH: Yes, your Honor.

THE COURT: Plaintiff, I hadn't understood that. Are you contending that there is some action that an employee takes to log-in or log-out? You referred to it as log-in log-out.

MS. LIU: I apologize to this Court if I mischaracterized the evidence.

What I meant is not that she was logging at 5:05 and then that will generate the time. The time was already in the computer. But she will see the computer, the employee has -- the manager has their own access to the computer.

THE COURT: Sorry. But is anything being entered each day by anybody as to a particular employee?

MS. LIU: No.

THE COURT: So we have a schedule and it's for the fact finder to figure out how faithful actions in the real world were to the scheduled expectation. Is that about right?

MR. KEITH: Yes, your Honor.

MS. LIU: Yes, your Honor.

THE COURT: So what remains to be seen is how we design a verdict form, but I think it's helpful that we've agreed that the findings for any individual employee then are liability and then as to damages at an hour as well.

We then get to the issue of willfulness and good faith. As I understand it, you all agree that the jury resolves the issue of willfulness under both statutes and good faith under the New York Labor Law but the judge resolves the issue of good faith under the Fair Labor Standards Act.

To begin with, that seemed to be clear from your joint pretrial order. Is that correct?

MS. LIU: That is the plaintiffs' position.

MR. KEITH: Yes, your Honor.

THE COURT: Again, for another day we can resolve this but I'm trying to figure out how this all works.

I take it the judge's good faith determination of the FLSA is based on the same pool of evidence or data that the jury will be making its determination. It's not that you envision some posttrial supplementation of evidence that would enable me to make a good faith determination under the FLSA. I

am to rely on the same evidence given to the jury.

Is that correct?

MS. LIU: Yes, your Honor.

MR. KEITH: That's correct, your Honor.

THE COURT: And somebody help me what difference it makes. I realize I may need to make a formal entry as to this point. But in the real world is there, assuming that the defense has -- that the plaintiff has prevailed across the board, let us say, and found for the plaintiff on any of these inquiries. Does the plaintiff get anymore money by my making the parallel lack of good faith, if that's the right way to put it, finding under the FLSA or is the recovery the same as long as the plaintiff so prevails under the New York labor law?

I'm trying to figure in the real word what difference this makes.

MS. LIU: New York labor law has longer years. It has six years. It covers the three years under FLSA. So that covers the backpay basically.

But what ties to the good faith is also the liquidated damage. So that will give us the double.

THE COURT: Right. But I think there's case law that has recently been sharpened -- I've certainly written on it -- involving the unavailability of overlapping liquidated damages under the two statutes.

MS. LIU: Yes.

THE COURT: What I'm trying to figure out is, assuming you prevail under the New York Labor Law that has the longer statute of limitations, in practice what difference does it make how the Court would find as to the Fair Labor Standards Act good faith as long as I'm not disturbing the jury's finding on the New York labor law equivalent?

MS. LIU: I would say the stacking, the case you are talking about, is about how both the liquidated damage under the FLSA and the -- so it will be triple. But what we're saying if we only talk about good faith, so we only win liquidated damage under New York Labor Law. So that's double under New York Labor Law with six years. So in practical matter whatever comes out of FLSA doesn't really change.

THE COURT: That's where I was going. In other words, if one starts with the premise that you don't get to have overlapping liquidated damages but one bite only at that apple, if you had maxed out on your New York Labor Law recovery, the FLSA adds nothing incremental.

MS. LIU: Yes.

THE COURT: Defense, while I'll know you resist the factual assumptions under which the hypo was built, giving yourself over to them for a moment, do you agree with that?

MR. KEITH: I think, your Honor, the only instance in which it might make a difference, and I think we'd have to look at the eight individuals to see if any of these time periods

come into play, is prior to, I believe it was April 2011, the liquidated damages rate under the New York Labor Law was 25 percent. And then post-amendment to the statute there is a liquidated damages provision that's coextensive. So if there's any window in there --

THE COURT: I see. That's where it may matter.

But, in any event, that's an entry that I would be making based on the same pool of evidence. Thank you. That's helpful. I was trying to figure out why anything turned on it and now I understand why it might.

The jury's verdict form will presumably include willfulness and good faith determinations to the extent liability has been found.

I assume but don't know that the willfulness or good faith determination would be unitary at least per employee, i.e., it wouldn't depend on the time period. Perhaps there's some employee where the nature of the responsibilities changes enough over time that the willfulness or good faith analysis is different, but I'm going to assume, unless I'm told otherwise, that for each employee it's a singular determination.

Any reason to think differently about that?

MR. KEITH: Not at this point, your Honor.

THE COURT: Plaintiff.

MS. LIU: No, your Honor.

THE COURT: I suppose closer to the trial we'll need

to figure out whether there's any basis for a willfulness or good faith determination that is employee-specific as opposed to across the board.

In other words, the other way to think about the task given to the jury is for -- to the extent you have found Bed Bath and Beyond liable for misclassification, was that misclassification willful? Was it made other than in good faith?

However, the question is put -- there's a question of whether there's a need to make them answer that question per employee or whether it's an all-in, same determination for everybody.

Is there any reason to think that that is an employee or plaintiff-specific issue in this case?

MR. KEITH: I don't believe so, your Honor. I think, though, to your point about the jury verdict form, I don't think that there's any reason not to the include the question of willfulness and good faith on each individual.

THE COURT: Will the evidence as to willfulness and good faith differ by individual?

In other words, how many -- we've got, what, eight employees?

MR. KEITH: Eight.

THE COURT: How many stores do they span?

MR. KEITH: It spans approximately a dozen to fifteen

stores. People move around from time to time.

THE COURT: Is it going to be your view at trial that there are differences in the responsibilities materially among these eight employees?

MR. KEITH: I think that the evidence will show that as to individuals that worked in larger stores, for example, that the case for the exempt status, in our view, is very clear. And to the extent the jury disagreed on an individual who worked in, say, the large store in Chelsea or Tribeca where we think the evidence would be overwhelming that the individual meets the exemption, I think arguably there's a stronger case for a good faith basis in a hypothetical example if someone is in a store where she or he has 35 direct reports versus someone who is in a store where they have five or six direct reports, I think that's the case to be made there.

So we would propose that it be done --

THE COURT: So, in other words, you believe there will be a basis to differentiate as to liability as to individual plaintiffs even though they had the same formal title?

MR. KEITH: Correct.

THE COURT: And, therefore, it follows that if the jury disagrees with you on liability they may still find other than willfulness or good faith in the closer cases?

MR. KEITH: Yes, your Honor.

THE COURT: And were the determinations, in fact, made

at a store level or did Bed Bath as a corporate matter automatically classify anyone who held this title as exempt.

MR. KEITH: For the time periods at issue in the case all the eight plaintiffs were classified as exempt as were all other Assistant Store Managers in the State of New York.

THE COURT: Were those decisions made at the store level or was that at a broader policy level?

MR. KEITH: That would have been a corporate level.

THE COURT: So if that's the case, pushing back on your theory, if the decision is not made with regard to the facts and circumstances of any employee's employment, even if its accuracy or not might depend on the individual employee, if it's being done as a macro corporate level without regard to the 35 direct reports or five, how can it be that the willfulness or good faith decision differs by employee?

MR. KEITH: I think the way that the jury could find that it differs is one of the other things the evidence will show is that people move in and out of a position; may move from a lower level nonexempt department manager position into an Assistant Store Manager role. And to the extent there's evidence that someone is moved from a nonexempt role to an exempt role based on things like store size and number of reports and people that they supervise, that that decision, even though the actual classification decision is such, is done at the corporate level. Assistant Store Managers are salaried

exempt positions. To move someone into that role based on the circumstances of the store and the need for managers and supervision, that individual decision to move someone from nonexempt to exempt is done with a good faith basis that they're going to be able to meet the test for the exemption.

THE COURT: But is that decision made at the level of the individual employee or it's -- you know, regardless of whether you were hired into the role of Assistant Store Manager or promoted internally to get to that point, I think you're saying to me that anyone who holds that title is automatically treated as exempt.

MR. KEITH: That is correct, your Honor.

THE COURT: If that's the case -- we don't need to decide this now, but I have some skepticism about the idea of why I need to task the jury with making these findings separate for each employee if ultimately the corporate decision maker was -- and I don't mean this in a negative way -- blind to the individual's facts and circumstances when an across-the-board determination was made.

I don't know who this benefits or harms by making it at a global level. But as a matter of the way the evidence will present as to what was before the decision maker, it sounds like it's global assumptions as to responsibilities not specific facts as to any individual.

MR. KEITH: Understood.

THE COURT: Count me skeptical then of the need to attach all these extra questions per employee. We'll talk about it as we get closer to trial. But something to think about.

Plaintiff, any further thoughts on that.

MS. LIU: No. But I agree this Court's position. I believe it's very, very difficult, even I do see some argument on both sides, to ask a jury to assess individually. Even if you look at plaintiff Miglis, she moved -- I don't know -- four to five stores during the relevant years. It's very, very difficult for them to have this mental exercise and to determine for each period whether there was a willful violation.

THE COURT: But it really just depends whether somebody is making a determination for each period. If Bed Bath actually was stepping back and saying as to Eleni Miglis we need to now freshly assess whether she's exempt or not, the jury would simply be tracking the decision-making process of Bed Bath at each stage.

But if it's the case, as defense counsel concedes, that the exemption follows from the title, not because it's hard for the jury, but because it just tracks the way the corporate decision making was made, it sounds like it's a on/off switch as a one-inquiry-for-all-people decision.

MS. LIU: Yes. I can see that point as well because

they are not making conscious decisions and tailored to each store as to their circumstances.

THE COURT: Right.

MS. LIU: So can't ask them to do the jury.

THE COURT: Right.

Look, I'm not saying the same decision applies for each employee as to liability because they may have -- even though they've got a kind of one-size-fits-all approach here, or anyone who owns the title, has the title, is treated as exempt, that doesn't mean they didn't get it right in some circumstances and wrong in others, depending on what the facts actually show as to the particular worker in question.

All right. Let's now turn to the big question here which is the length of the trial.

Earlier both of you projected the astonishing length of an 18-day trial which was mind blowing to me that any jury would be able to, if we're talking about the jury's aptitudes and comfort level, sit through this for 18 days.

That said, at the time that an 18-day trial was projected, the plaintiff was proposing to call seven plaintiffs and potentially two Bed Bath witnesses. And the defense was intending to call 41 witnesses. I didn't check whether the two plaintiff witnesses are among the 41. I think they are, but I'm not sure. But let's assume that they're not. We would have been at a total of 50 witnesses.

My order from some months ago limited the defense to calling 10 of the 30 witnesses whom it had failed to give prior notice of and then empowered the plaintiff to take depositions of those ten and the plaintiff wound up choosing to take depositions of three of the ten that were identified.

The bottomline is the defense, rather than calling 41 witnesses, is now proposing to call 21, which is still formidable but makes a certain amount of sense if its the case that you have able people spanning a double digit number of stores.

In any event, the defense witness list has been lopped in half and my motion in limine rulings should also have taken out of the case any attempt, in particular, to litigate workplace bad behavior or disciplinary actions and whatnot by plaintiffs which should further truncate the examination. The focus here really needs to be tightly around the employees' job responsibilities as well as issues of willfulness and good faith.

So with that it's my hope that what was once an unmanageable 18-trial-day trial is probably, you know, more like six to eight days or something like that. I just can't imagine after a point that we're going to have the same repetitive testimony. I assume you'll find ways of shortcutting as, once the jury becomes aware of the general nature of a Bed Bath store and the general nature of the

responsibilities, I would like to think that successor plaintiffs and, in particular, successive defense witnesses will find a way to be more efficient.

Plaintiff, is that realistic?

MS. LIU: The pure number of witnesses is very intimidating. I believe six to eight days is a little tight. I propose maybe twelve days, if possible.

THE COURT: Just tell me what's going to take twelve days here.

In other words, each of -- the plaintiffs will tell their story about what they do. I'd be surprised if the direct of a plaintiff is more than an hour. I mean, right? The jury is going to go nuts and the same even more so with the defense. But if you're -- if they can't explain what their responsibilities are in an hour, I think the jury -- you're going to lose the jury.

MS. LIU: I agree.

THE COURT: I'm not holding you to it, at least for now I'm not giving anyone a chess clock, but I am trying to have an intelligent conversation about how a jury is going to take in this repetitive set of narratives.

MS. LIU: I understand that.

I think my consideration is more giving a little buffer instead of having it six or eight days and I'd rather have a little wiggle room so if anything happens.

THE COURT: We're not asking about wiggle room. I'm trying to get an estimate of in the real world what this is going to take, not what I forecast to the jury during jury selection, but I'm trying to get a real honest sense of how long the trial is going to be.

MS. LIU: I would say eight to ten days.

THE COURT: Defense.

MR. KEITH: I think the six to eight day range for testimony and proof is something that is probably achievable once we have a chance to go back and study how the motions in limine are going to fully impact the exhibit list. I continue to believe that we're probably going to need three days for jury selection, jury charge, opening.

THE COURT: Jury selection in a civil case is very fast. In a case like this it is unlikely to stoke a lot of the things that tend to inflame juries. It will be a little longer than in some cases because the promise of a three-day trial tends to get people pretty comfortable before claiming hardship. But a two-week trial, which is the length of the jury service, is not something that's likely to generate many hardships.

Ordinarily, in a civil case I'll have eight jurors so that we have room for a couple to drop. This is a little longer. We'd probably have nine. But the actual exercise in jury selection should be done in a couple hours.

MR. KEITH: I tend to agree with plaintiff's counsel. I think we'll probably be more in the ten to eleven day range but certainly anything we can do to speed that along we want to do.

THE COURT: I'm going to assume for argument's sake that, partly depending on whether I sit on Fridays, we should be able to get this done in two weeks. That would be ten days.

Let me ask you, plaintiff, you've got eight witnesses. Each of them needs to tell their story, but I'd like to think that as an accomplished advocate you can find a way once we get to numbers three, four, five, six, seven, eight that you are briskly moving through this and not requiring the same explanations of recurrent processes or tasks to be done.

MS. LIU: Yes. That's my goal, your Honor.

THE COURT: Defense.

MR. KEITH: We would endeavor to do the same, yes.

THE COURT: I'd like to think so.

An important job for me in a jury trial is being mindful of the jury's time, and I'm very attentive to when they are just enraged by lawyers indulging themselves and wasting their time. So I would urge each of you to figure out ways to be as crisp as you can doing this.

I'm going to assume that I need to set aside ten trial days here but I'm very much hopeful that includes all in, the jury addresses, and deliberations. But it's my hope that we

can get this done substantially faster than all that. All right.

Let's go to the exhibit lists. I recognize that these are likely to change given the pretrial rulings. But I want to start with you, plaintiff.

Do you have your exhibit list in front of you?

MS. LIU: Yes, your Honor.

THE COURT: And before trial -- look I'm going to direct in a couple of weeks that we get a revised joint pretrial order which I expect will make excisions from witnesses and from exhibits based on the motions in limine and so forth but I will need, once we have that, a pair of binders from each of you with respect to the exhibits you intend to offer so that I can, at our final conference, be making rulings that are with the exhibits in hand.

Let me understand from you, plaintiff, on your exhibit list -- does everyone have it handy?

MS. LIU: Yes.

THE COURT: So your first eight exhibits are the work schedules -- rather, the first one is defendant's answers. Put that aside. Plaintiffs' 2 through 9 are the work schedules for the eight witnesses and you indicate that there is no objection to authenticity but evidently the defense objects to the receipt of the work schedule.

Mr. Keith can that really be so? What's the basis for

objecting to the work schedule?

MR. KEITH: The basis to the objection to the work schedule is to the extent plaintiffs intend to introduce the work schedules as evidence of the hours that were worked or the minimum hours that they say were worked, we would --

THE COURT: You're just objecting to an argument that they would make about how much it proves. But focus on admissibility. What's the coherent argument as to why the work schedule doesn't get received even though you're at liberty to cross-examine as to the extent as to which it was faithfully adhered to? How is that an issue of admissibility?

MR. KEITH: I think -- I agree with that, your Honor. I've think that as to admissibility, as business records of the company, that those would be admissible.

THE COURT: Hard to imagine anything more admissible in a case like this than the schedule that the employee was given, whether or not they rolled in late or worked late.

MR. KEITH: Understood.

THE COURT: Can I assume, please, that when I get the revised joint pretrial order with the exhibits please be more discerning then about what you're objecting to because my head blew off when I saw that you're objecting to the plaintiff's work schedule in an FLSA overtime case.

MR. KEITH: We will, your Honor.

THE COURT: Now, turning to the second page, the

plaintiff had the idea of offering a bunch of declarations for impeachment purposes of what looked to be twelve people. What is this? Just explain to me what these exhibits are.

MS. LIU: So those exhibits are declarations defense has submitted in support of our position to the collective action. So that declarations includes their statements about the policies, the structures, the stores, and some of their interactions with specific plaintiffs. So we intend to introduce them only for the purpose of impeachment.

THE COURT: Impeaching who?

MS. LIU: That those witnesses that were on the list of defense witnesses.

THE COURT: I see. So, in other words, if those witnesses testify.

MS. LIU: Yes.

THE COURT: You would try -- and they don't admit the prior statement.

MS. LIU: Yes.

THE COURT: You would try to introduce those things.

MS. LIU: Yes, your Honor.

THE COURT: I think as to impeachment matters -- look, I appreciate the notice. That's sufficiently contingent on the way the trial plays out. There is no value in a pretrial ruling. OK. I understand it.

But, in other words, the idea is you would be offering

that only as impeachment if you couldn't otherwise score the point that's embedded in these documents.

MS. LIU: Yes, your Honor.

THE COURT: All right. Defense, as to your exhibit list, a lot of -- there are a lot of performance reviews that are listed here. There are also disciplinary notices.

Now you've heard my ruling that says none of the denigrating information is in unless there's really no other way to get at the job performance. But having worked in the private sector before, I remember that performance reviews often start off with the name and dates and then the job responsibilities, and then there's often another section or zone where the judgmental stuff is described, and my point in excluding evidence was really dealing with the judgmental point. Whether or not somebody was a good or a bad employee or whether or not they were a scoundrel in their personal life is really irrelevant to the FLSA question but the job responsibilities matter.

How much does the motion in limine ruling affect the documents you would be proposing to offer? Do all of these performance reviews, for example, contain in some segregable place a description of the job responsibilities?

MR. KEITH: There are really two categories of performance reviews. I apologize. We probably could have made this more clear on our witness list.

Starting with the first category which are those performance reviews of the individual eight plaintiffs themselves, which are directly impacted by our motion in limine, those will either have to be redacted or there may be some which come off the list entirely in conformance --

THE COURT: But your expectation is that for a lot of these performance reviews there's some part of the performance review that just gets to describing the duties that can survive a redaction?

MR. KEITH: There is but there's additional categories. Many of these documents, the ones that say Associate Performance Review, the associate is the title given to hourly employees, cashiers, people that are on the floor helping customers and the like.

THE COURT: People who have supervised by the plaintiffs?

MR. KEITH: Exactly. So when Ms. Miglis, for example, fills out a performance review for someone that we contend worked under her and says this person is doing a good job, this person is not doing a good job, or on the issue of discipline, which directly bears on a plaintiff's exempt status, when one of the eight plaintiffs here is issuing discipline, is terminating someone, is suspending someone, those performance reviews of people that are not parties to this case, these are --

THE COURT: I see. That actually shows Ms. Miglis doing her job.

MR. KEITH: Yes, your Honor.

THE COURT: So that doesn't implicate the issues that I was concerned about. There might be an individual one where there's something poisonous about the subordinate, but that's not the point of anybody's motion, and I assume you'll be sensitive to not trashing some nonparties reputation.

Subject to that off-chance, there doesn't seem to be any dispute that the performance review done by one of these plaintiffs of an underling is properly in because it reveals part of the nature of the job.

MR. KEITH: That's right, your Honor.

One of the reasons for the generic titles in here, and we've done the same thing in our summary judgment conditional certification papers is tried to refer to the associates in general terms or redact their names exactly for those concerns that we don't want to unduly tarnish the reputation of nonparties.

THE COURT: That's helpful.

So the associate reviews are of other people?

MR. KEITH: Yes, your Honor.

THE COURT: But the performance reviews, for example, D-1 through 4 of Ms. Miglis, you will now be taking a look at the reviews of Ms. Miglis and redacting it to be consistent

with the motion in limine.

MR. KEITH: Yes, your Honor.

THE COURT: I noted that none of these were objected to by the plaintiff. There are two stars here. Notwithstanding the motion in limine, and I think I now understand, that it's because there is some irreducible portion of these performance reviews that is not judgmental of the plaintiff but is descriptive of the plaintiff's duties.

MR. KEITH: That's our position, your Honor.

THE COURT: And plaintiff's counsel, Ms. Liu, is that why you didn't object?

MS. LIU: Yes. Another reason is we did file a separate motion that's part of our -- yes, your Honor.

THE COURT: Well, no, no, no. You've indicated you don't have any objection to the admissibility.

MS. LIU: Yes.

THE COURT: I'm trying to get underneath why.

I've think what you're saying, help me out, is that you acknowledge that even in the performance reviews of a plaintiff there is some portion of it that is fair game and that describes the job even if there's a portion that is subject to your motion in limine which gets at, you know, negative stuff.

MS. LIU: Yes, your Honor.

THE COURT: Continuing on. D-21, there is the

termination of Ms. Miglis. Defense, that is objected to. Again, unless there's something unique about her termination that uniquely reveals her duties, I'd like to think that that -- we can get rid of the word "termination" and make sure the jury knows the end date of her employment. I expect you'll be flyspecking a document like that consistent with the motion in limine.

MR. KEITH: We will, your Honor.

THE COURT: And there are one or two other single asterisks here reflecting separations or things like that, but I expect that defense counsel you will flyspeck those.

MR. KEITH: Yes.

THE COURT: It looks like a fairly low-exhibit case, given the scale of the case of a two-week trial. It does not appear that there are going to be a lot of exhibits in the case all in. There are a lot of performance reviews of either the plaintiffs or of their underlings by the plaintiffs. There will be wage statements and the like.

MR. KEITH: That's right, your Honor.

THE COURT: All right. The next issue involves a trial date.

MS. LIU: Your Honor, if I may, just one thing about Exhibit D-49. It's plaintiff's resume.

THE COURT: Yes.

MS. LIU: We objected for very similar reasons we

stated in our motion in limine. It's a resume. Everyone puffs up their resume. They make statements that's higher than what they actually did. And we believe it's not a true reflection of the responsibility.

THE COURT: Wait. You're saying your client lied on his resume?

MS. LIU: I would say dressed up.

THE COURT: I'm sorry. This is a separate issue here. I had been under the impression that -- the motions in limine dealt with other issues.

MS. LIU: Yes.

THE COURT: The motions in limine dealt with employment deficiencies of the sorts I imagined and I didn't treat those as impeachment issues but rather as irrelevant, negative information about a person and found those easily excluded.

Lying on a resume raises a simply different legal question which is whether or not a lie to the employer affects trial credibility. That's just not been briefed. I'm not going to rule on it now.

MS. LIU: Yes, your Honor.

THE COURT: I appreciate that's why -- you're objecting because you don't want the puffed-up stuff -- what is it that Mr. Caraballo puffed up?

MS. LIU: Glorified what he actually did.

THE COURT: At Bed Bath?

MS. LIU: Yes.

THE COURT: Wait a minute. You're trying to exclude -- you're not saying he lied about his military service or his college degree?

MS. LIU: No.

THE COURT: You're saying he held himself out at Bed Bath to have a more glorified job than you now contend he did.

MS. LIU: I'd say some of his descriptions are more puffery.

THE COURT: I'm going to tell you right now if he's describing his job at Bed Bath, that comes in. You're at liberty to explain to the jury that he was puffing. But if you had told me he said he was a major general in the Army and actually he was a private, I would have considered whether that was fair ground for impeachment given the nature of the claim here.

But if you're saying that he described himself as having more supervisory-ish or exempt responsibilities at Bed Bath, it's hard to imagine a more relevant statement.

You're at liberty to say that he was puffing and that everyone puffs on their resume. Good luck with that. You're at liberty to do that.

But the only reason that is prejudicial is that it's fairly, not unfairly prejudicial under Rule 403. If your

client appears to have described his job in terms that might make the exemption fit better, that's for a jury to decide whether to credit him now or then. It's not for me to exclude the bad stuff.

MS. LIU: Yes, your Honor.

THE COURT: I mean really. OK.

Your objection is noted. I'm telling you right now unless there's something more to this, it's overruled.

MS. LIU: Thank you, your Honor.

THE COURT: But in any event -- all right. Look. Let's talk about a trial date. I need to set aside approximately two weeks. I have in April a possible, but not certain, criminal trial that begins on April 1. But we do not know if it is, in fact, going to go. I am inclined to schedule this trial in mid-April on the assumption that that case which is essentially a holding date for spillover defendants who are ostensibly going, if they are, in January, that it won't go, or it won't go very long to the extent there's a hangover defendant. So I'm inclined to schedule this trial something on the order of April 22 or so. I can give you the entirety of that week and I can give you the first three days of the week after. I think I'm out the next few days. We can then continue into the next week if need be. It's possible we can even start this the week before if the criminal trial doesn't go.

Any reason not to schedule this somewhere either April 15 or April 22, somewhere in that April timeframe?

MR. KEITH: Cards on the table, purely candidly, I have nonrefundable plane tickets the start of April, so the 22 would --

THE COURT: Would be what?

MR. KEITH: April 22, it would not be a problem at all for me.

THE COURT: When and where are you going?

MR. KEITH: I'm taking my wife to Hawaii for an anniversary trip.

THE COURT: When are you due back?

MR. KEITH: They took my phone so I don't have the exact date. I believe I'm back I think the 12th or the 13th.

THE COURT: So from your perspective, while you literally could do something like the 15th it's -- that would be an inconvenience because you'd be -- have a very tight turnaround?

MR. KEITH: Yes, your Honor.

THE COURT: Plaintiff, any issues on your end?

MS. LIU: No, your Honor.

THE COURT: One moment. Let me talk with Mr. Smallman.

(Pause)

THE COURT: Counsel how about April 22 then and I think with that point we've cleared Passover, have we not, Mr. Smallman. I think we have.

(Discussion off the record)

THE COURT: I'm sorry. I put Mr. Smallman on the spot. I'm pretty sure I checked this and we're fine.

We'll put it down for April 22. Let's operate on the assumption that we're going to sit all five days the first week. I can give you the first three days of the week after. I am personally out the Thursday and Friday of the second week. And if it goes more than eight days, we would carry on into the following week. OK. But I think that gives you a reasonably prompt trial date and something to work towards.

Mr. Smallman tells me the first day of Passover is April 20. That's a Saturday. It's a two-day holiday. By the 22nd we're not going to have a problem with the jury.

I will need to set a final pretrial conference just to go over the sorts of blocking and tackling with exhibits as prompted by the joint pretrial order.

So, Mr. Keith, you're back on the 12th or 13th or something?

MR. KEITH: Yes, your Honor.

THE COURT: So let's just do some day the week before.

Mr. Smallman, can I have a slot of a couple hours the week before April 22?

(Discussion off the record)

THE COURT: How about April 18 at 10 a.m. for our final pretrial conference?

MR. KEITH: Thank you.

THE COURT: That works for everybody?

MS. LIU: Yes, your Honor.

THE COURT: Look, I need you then to get me a revised joint pretrial order. You're not to be adding new things. But this is now to zap out the 20 defense witnesses who were earlier removed. It is to zap out anybody else you no longer think you're going to call. It's to conform the exhibit list to the rulings that I have made. And I will need with it two binders from each of you, one for me and one for my law clerk, of the exhibits you're going to propose to offer.

It's not urgent that I get this, obviously, just given the holidays. Under ordinary circumstances I would have said two weeks but -- and if you've got the time to do it now it would make sense to get it done while it's fresh but I'm also not going to burden you with makework which could be done in January.

Ms. Liu, any reason for you why two weeks would be an inconvenience? You're really just tweaking an existing document.

MS. LIU: No, your Honor.

THE COURT: Defense?

MR. KEITH: No, your Honor.

THE COURT: So within two weeks of today get me a revised pretrial order as well as two exhibit binders from each side.

All right. The final issue I want to take up is settlement. I see from the docket sheet I have not yet referred this to the magistrate judge for settlement purposes. We have here the terrific Barbara Moses who is a magistrate judge who in her first two to three years on the bench has, in the cases of mine, been a gem at successfully settling tough cases. It would be my strong preference to refer this to her for settlement purposes if there's any chance you're going to use that resource. But you know you are now about to start gearing up for a regrettably longish trial that will take a lot of time and energy. There's obviously risk on both sides here.

It would seem to me that this is the time before all that hard trial prep work gets going for you to see if there's a way of settling the case.

I do not want to hear anybody's settlement position. There is no purpose in exposing me to that. But is there any reason why I shouldn't refer it to the magistrate judge for settlement purposes?

MR. KEITH: No, your Honor. This is a topic that we've actually had the opportunity to discuss. I think we're both in agreement that a referral to the magistrate program

would be beneficial to both sides.

THE COURT: Ms. Liu.

MS. LIU: Yes, your Honor.

THE COURT: Ms. Liu, do you represent any of the plaintiffs in any of the other case or cases raising such issues?

MS. LIU: No, I don't.

THE COURT: And defense, without telling me anything you don't want to, is there anything you can tell me about the ability to settle this case independent of those other litigations?

MR. KEITH: Yes, your Honor. I've shared this information with Ms. Liu as well. In one of the other cases pending in the Northern District of Illinois, the Przytula case, which I believe we brought to the Court's attention at prior conferences.

THE COURT: Yes.

MR. KEITH: The parties spent two days in mediation there and we've reached an agreement in principle to settle that case. And that's a nationwide collective FLSA settlement. As part of that, because this case was pending, that settlement carved out those eight people. As soon as that deal was reached, we let plaintiffs' counsel here know so that there would be no unfair surprises. And we've started to have some preliminary conversations about what the settlement would look

like for these eight individuals were they to be treated on the same basis --

THE COURT: I see.

MR. KEITH: -- as the plaintiffs there. And that's information that I'm getting ready to hit send on, to send to Ms. Liu.

THE COURT: I take it, without committing you to anything, because I'm not here to do that, but a safe premise here would be that terms that are resembling of the terms in the nationwide settlement may be on the table here for these plaintiffs.

MR. KEITH: Yes, your Honor.

THE COURT: OK. That's important information. I'm glad you shared it with me. All the more reason why it's good that I put this trial off in April because it's my hope that you will now have serious settlement discussions. You may or may not need Magistrate Judge Moses, but I will issue the order referring it to her today. And what I'm going to do is I'm going to write on the order what I always write on these orders in counseled cases, which is it's on plaintiff's counsel to reach out to the magistrate judge to schedule the settlement conference but only when both of you are ready. I'm putting the scheduling onus on the plaintiff just because it's my practice. There is no magic to that. It's just you're not going to get on the phone with her to do that until you've both

agreed that the time is right.

Let me urge you that before work gets going, it would be useful for me, it would be use for plaintiffs, it would be useful for everyone to get closure on this. If this is destined to settle, please let's not have this settle in April. It's just an enormous waste of time because, apart from the photocopying and work that you're going to be doing over the next two weeks; defense, you've got 30 witnesses to prep; plaintiff, you've got eight clients to prep. There's a lot going on and more than a little bit of logistics.

If you're going to talk settlement, if you're going to try to get this accomplished consistent with an otherwise global settlement, may I urge you to -- I'm putting a lightning charge for you to do this before the holidays. Let's try to do that.

Can you both agree to give intense, focused attention in the next two weeks to this?

MS. LIU: Yes, your Honor.

MR. KEITH: Yes, your Honor.

THE COURT: I'm holding open two weeks of my schedule. I've got other people bidding for trial dates. You've been out there for a while. I wanted to get you a date. But I now see a route to a settlement here that seems very plausible. It would certainly be an act of kindness to the Court to let me know sooner rather than later whether the case is going away.

MR. KEITH: Of course, your Honor.

MS. LIU: Yes, your Honor.

THE COURT: Anything further from the plaintiffs? Is there anything that would be useful for me to address while I have you here?

MS. LIU: Nothing, your Honor.

THE COURT: Anything from the defense?

MR. KEITH: No, your Honor.

THE COURT: So I'm going to issue an order that simply sets out the fact that I've resolved the motions in limine, gives you two weeks to submit an amended joint pretrial order and exhibit binders, sets the date of the trial, and sets the date of the final pretrial conference, and I will issue a separate order that refers the case for settlement purposes to Magistrate Judge Moses.

All right. I wish you all a happy and healthy New Year and look forward before then to hearing from you, I hope. Thank you. We stand adjourned.

(Adjourned)